SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
SEP 20 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-274

WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION,

Petitioner,

v.

CATHERINE SCOTT, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
237 West Trade Street
Charlotte, North Carolina 28202

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

Attorneys for Respondents

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Statement

This school desegregation case was filed October 2, 1968. The opinion of the district court shows that at the time of trial in 1970 eighty-three percent (83%) of the black students in the system (11,539 of the total Negro student population of 13,879) were attending 19 all-black or virtually all-black schools (A-7 to A-11).[1] In this group, 8,565 Negroes attended 15 schools which were 100% black, and the rest were in two schools more than 99% black, one 98% black school and one 97% black school (A-7 to A-11). The district court opinion traces the history of school segregation in the community. No Negro child was admitted to a

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[1] The appendix to the petition for certiorari is cited herein as "A- ".

white school until 1957, or three years after *Brown* v. *Board of Education*, 347 U.S. 483, when a single Negro child was admitted to a white school in the district. Only a handful of Negroes were allowed such transfers in the ensuing several years; the number changed from 4 pupils in 1958 to 44 pupils in 1962, the sixth year of limited "integration" of the system (A-13). Separate overlapping attendance zones and bus routes based on race were maintained until the district was forced to abandon them to maintain its eligibility for federal financial aid under the Civil Rights Act of 1964 (A-14). In 1966-67, the district established a geographic attendance zone plan with a free transfer provision (A-15).

Plaintiffs sued contending that the free transfer plan was inadequate to bring about desegregation of the system. Cf. *Green* v. *County School Board*, 391 U.S. 430; *Monroe* v. *Board of Commissioners*, 391 U.S. 450. The school board, at trial, presented a proposal which would have increased the number of Negroes not in all-black schools from about 2,340 in 1969-70 to about 3,737 in 1970-71 (A-36 to A-38). The district court held that the board's desegregation proposal was insufficient, stating in its conclusions of law:

> 3. Upon proper compliance with the direction of the Court herein with reference to Diggs Elementary, Kimberly Park Elementary, Cook Elementary (Carver Crest), no person will be excluded from any school because of race or color.
>
> 4. The plan of the Board for the operation of the three schools mentioned in Paragraph 3 first above does not comply with recently enunciated constitutional principles in this Circuit, and the racial composition in these schools must be changed.
>
> 5. Except in the area of pupil composition, the Board's plan effects a unitary system.

The district court ordered additional steps to desegregate the three all-black elementary schools mentioned, an order which had the anticipated effect of increasing the number of Negroes not in all-Negro schools to about 5,175[2] or nearly double the number in such schools at the time of trial. Both sides appealed to the Fourth Circuit, with the board arguing that the added integration ordered by the district court was improper and burdensome and the plaintiffs arguing that the district court erred by permitting the board to continue to maintain more than 8,000 black pupils in twelve all-black schools. During the 1970-71 school year the district court's plan remained in effect and the court of appeals postponed argument until after this Court's decisions in the Charlotte and Mobile cases. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33.

The case was briefed and argued in the court below following this Court's *Swann* and *Davis* decisions, *supra*. A per curiam decision of the Fourth Circuit, sitting en banc, was issued covering Winston-Salem/Forsyth County and three other school systems. The Fourth Circuit, on June 10, 1971, remanded the cases "to the respective district courts with instructions to receive from the respective school boards new plans which will give effect to *Swann* and *Davis*" (A-99). The Court held:

> It is now clear, we think, that in school systems that have previously been operated separately as to the races by reason of state action, "the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation,

[2] The number of additional black pupils desegregated by the integration of these three all-black schools is obtained from the board's projections. See record in the Fourth Circuit, pp. 246-254.

taking into account the practicalities of the situation." *Davis, supra* at ——. We remand these cases because the respective district judges did not have the benefit of the Supreme Court mandate that adequate consideration be given "to the possible use of bus transportation and split zoning." *Davis, supra* at ——. Wherever schools are "all or predominantly of one race in a district of mixed population [there will be required] close scrutiny to determine that school assignments are not part of state-enforced segregation." *Swann, supra* at ——. Although the existence of "some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law," *Swann, supra* at ——, both the school authority and the district judge must nevertheless be concerned with the elimination of one-race schools. (A-99 to A-100)

* * *

The school authorities and the district court should consider the use of all techniques for desegregation, including pairing or grouping of schools, noncontiguous attendance zones, restructuring of grade levels, and the transportation of pupils.

If the district court approves a plan achieving less actual desegregation than would be achieved under an alternative proposed plan it shall find facts that are thought to make impracticable the achieving of a greater degree of integration, especially if there remain any schools all or predominately of one race. (A-101 to A-102)

* * *

In *Winston-Salem/Forsyth County*, the school board may fashion its plan on the Larsen plan with necessary

modifications and refinements or adopt a plan of its choice which will meet the requirements of *Swann* and *Davis*. (A-103)

Judge Bryan wrote a special concurring opinion emphasizing his understanding that the district court was not compelled to adopt the "Larsen Plan" advocated by plaintiffs, and that the district court had the "true" alternative of accepting some other plan meeting the requirements of *Swann* and *Davis* (A-104).

While the petition for certiorari seeks review of the Fourth Circuit decision of June 10, 1971, the board has attempted to support its arguments by reference to subsequent proceedings in the district court culminating in an order of the district court of July 26, 1971 (A-110 to A-115) directing implementation of a revised proposal presented by the school board (A-116 to A-144). However, the school board did not take any appeal from the order of the district court of July 26, 1971. Instead, the board presented an application to the Chief Justice for a stay of the district court order on August 23, 1971, pending certiorari. The stay application was denied with an opinion by the Chief Justice on August 31, 1971. *Winston-Salem/Forsyth County Board of Ed.* v. *Scott*, Oct. Term, 1971, No. 71-274, August 31, 1971.

Reasons Why the Writ Should Not Be Granted

Respondents respectfully suggest that the case does not present an appropriate occasion for the exercise of the certiorari jurisdiction.

1. The decision of the court of appeals is limited and narrow. It virtually tracks the appropriate language of this Court's decisions in *Swann* and *Davis* and directs recon-

sideration and the preparation of new plans in light of this Court's governing decisions in those cases. This was entirely appropriate, especially since admittedly the district court's opinion under review had been guided by the Fourth Circuit's 1970 decision in *Swann*. The petition for certiorari argues from the premise that the district court had concluded in 1970 that the system was unitary (Petition for Certiorari, p. 6). This premise is incorrect, as we have demonstrated in the Statement, *supra*, by quotation from the district court conclusions of law (A-66 to A-67). The court's conclusion was that "*Except in the area of pupil composition*, the Board's plan effects a unitary system" (A-67, emphasis added).

The district court justified its decision to permit twelve all-black schools to remain in the system by reference to the "reasonableness" doctrine enunciated by the Fourth Circuit in *Swann* in May, 1970:

> 2. Under the plan of operation submitted by the Board for the 1970-71 school year, there will result some all-white and some all-black schools. This fact, however, will not invalidate the plan because the large black residential areas in the City of Winston-Salem are such that *reasonably* all schools cannot be integrated. . . . (A-66; emphasis added.)

The district court then disapproved the Larsen Plan, advocated by plaintiffs as unduly burdensome relying on the precedent of the Fourth Circuit's *Swann* decision, rendered a few weeks earlier, which had disapproved a similar elementary school plan in the Charlotte case. Four days later, on June 29, 1970, this Court reinstated the district court plan in *Swann* (399 U.S. 926). And ultimately the Court upheld that plan. *Swann*, *supra*, 402 U.S. 1, 31. In these circumstances, it was entirely appropriate for the Fourth Circuit to remand the case for reconsideration.

2. The Fourth Circuit was also correct in directing that the school board might fashion its plan on the Larsen Plan, and that in any event if the court should approve a plan providing less desegregation "it shall find facts that are thought to make impracticable the achieving of a greater degree of integration, especially if there remain any schools all or predominantly of one race." The Fourth Circuit's conclusion that the Larsen Plan offered a viable method of desegregation was solidly grounded in that court's familiarity with the detailed record in the case (as well as with the record in the Charlotte case involving a comparable plan). The Fourth Circuit's conclusion that any approval of less desegregation than was promised by the Larsen Plan must be accompanied by specific fact-finding was solidly grounded on this Court's decisions in *Swann*, 402 U.S. 1, 25-31, and *Green* v. *County School Board*, 391 U.S. 430, 439.

The school board has asserted that it was compelled to adopt a plan racially balancing every school. The Fourth Circuit decision states no such requirement but merely enforces the presumption against one-race schools announced by this Court's *Swann* decision. The Fourth Circuit indeed even quoted this Court's language from *Swann* that the existence of "some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law" (A-99 to A-100). We see nothing in the opinion below which supports the proposition that the Fourth Circuit misunderstood the meaning of this Court's decisions in *Swann* and *Davis*.

3. The action of the district court following the Fourth Circuit decision presents no substantial question. Notwithstanding the school board's self-serving declaration that the plan it submitted in response to the decision of the Fourth

Circuit was based on "the required objective of achieving a racial balance in the public schools of Forsyth County," there is nothing in the record which supports the assertion that the courts below made any such requirement. On remand the school board presented the district court with only one proposal and that plan was approved over plaintiffs' objection. The district court chose the board's plan over the Larsen Plan. The board has filed no appeal from the district court's order approving its reluctantly submitted proposal.

The school year opened in September 1971 with the new plan in effect. No report on its operation has yet been filed in the district court, but the board has again filed a motion in the trial court seeking to have the plan withdrawn and permission to revert to the prior segregated pattern. The board's motion is now scheduled for a hearing in the district court. The resistance to desegregation and the litigation continue.

Respectfully submitted,

J. LeVonne Chambers
Adam Stein
Chambers, Stein, Ferguson & Lanning
237 West Trade Street
Charlotte, North Carolina 28202

Jack Greenberg
James M. Nabrit, III
Norman J. Chachkin
10 Columbus Circle
New York, New York 10019

Conrad O. Pearson
203½ East Chapel Hill Street
Durham, North Carolina 27702

Attorneys for Respondents